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Supreme Court, U.S.
FILED
MAR 18 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1321

SUPREME COURT OF THE UNITED STATES

October Term, 1984

CRISPUS NIX, Warden of the Iowa State Penitentiary,

Petitioner,

vs.

EMMANUEL CHARLES WHITESIDE,

Respondent.

RESISTANCE TO
PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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March 13, 1985

QUESTIONS PRESENTED

1. Whether the ineffective assistance of counsel holding of the Federal Court of Appeals is consistent with the holdings of the majority of courts who have addressed the issue.

2. Whether Respondent's right to testify was violated by trial counsel's conditioning further representation and confidentiality on the content of that testimony.

3. Whether the limited holding of the Court of Appeals makes it unnecessary to further explore the questions raised by Petitioner.

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EMMANUEL CHARLES WHITESIDE,

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RESISTANCE TO
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FOR THE EIGHTH CIRCUIT

Respondent Emmanuel Charles Whiteside respectfully prays that this court deny Petitioner's request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals granting Respondent a writ of habeas corpus.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment, United States Constitution

> No person shall be...compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property without due process of law. ...

Sixth Amendment, United States Constitution

> In all criminal prosecutions, the accused shall... have the Assistance of Counsel for his defense.

Fourteenth Amendment, United States Constitution

> No State...shall...deprive any person of life, liberty, or property without due process of law.

STATEMENT OF FACTS

Testimony at Petitioner's trial established that Emmanuel Whiteside and two companions, Terry Fowler and Derrick Doolin, went to the apartment of the victim, Calvin Love, and his girlfriend, Kathy Sauer, to obtain some marijuana. (Trial Tr. pp. 75-76)[1]. While there, an argument ensued about the marijuana and Love, who was lying on a bed, stated at least once that Sauer should get his "piece". (Trial Tr. pp. 78, 96, 238, 272, 302). At one point, Love got up, went to a

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[1] The trial transcript is being certified to the Court under separate cover.

different part of the room and then returned to the bed. (Trial Tr. p. 95). Then, Love made a move to get off his bed moving toward Whiteside. (Trial Tr. pp. 239, 272). A scuffle ensued and Love was fatally stabbed in the chest by Whiteside. (Trial Tr. pp. 272-274,303). Sauer then gave Whiteside the marijuana and the trio left. (Trial Tr. p. 81).

Testimony also showed that the room where the stabbing occurred was poorly lighted (Trial Tr. p. 237), that Love had a reputation for carrying weapons (Trial Tr. p. 326, 335), and that he was intoxicated the night he was killed. (Trial Tr. pp. 89-90, 160). It was also established that Sauer and Love's family broke the padlock off his apartment door and removed everything, including the carpet, the next morning. (Trial Tr. pp. 67, 102). Police officers had conducted a "cursory search" of the premises after Love had been removed by ambulance attendants. (Trial Tr. pp. 192-193).

A major point of controversy was whether Love reached under his pillow just prior to getting off the bed when he was stabbed. Kathy Sauer was not sure where Love's hands were. (Trial Tr. pp. 103-104). Fowler stated Love did not place them under the pillow while Whiteside and Doolin stated that he did put his hands under the pillow prior to getting up. (Trial Tr. pp. 241, 274, 302). Doolin, Fowler and Whiteside all testified that they thought Love had a gun but none stated that they saw

one. (Trial Tr. pp. 239, 274, 303-304).

At the hearing on Whiteside's Motion for a New Trial, Whiteside testified that when Attorney Robinson first visited him, he gave Robinson a written summary of the event that stated that he saw a gun in Love's hands. (A62-69)[2]. He stated that after no gun was found, Robinson told him he would withdraw if he claimed he actually saw a gun. (A70-72). He agreed to testify that he only thought Love had a gun based on the threat and that he felt, based on Robinson's assurances, it would all work out. (A74-75).

Gary Robinson testified that, after reading Whiteside's statement, Whiteside stated that he did not really see the gun and that Whiteside acquiesced in the strategy of trying to "create" a gun. (A77-79). He stated that, when it became clear that a gun could not be found, Whiteside insisted on testifying he saw a gun. (A84-87). Robinson said he told Whiteside he could not condone perjury, that if he testified he saw a gun he would withdraw, inform the court of the perjury and be available as a rebuttal witness. (A84-88). He stated that his threats caused Whiteside to testify as he did. (A89). Attorney Donna Paulsen testified to essentially the same things as Robinson.

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[2]References marked as (A67-89) are to the Appendix contained in Petitioner's Petition for Writ of Certiorari.

The trial court, in overruling Defendant's Motion for New Trial, stated: "I find the facts to be as testified to by Ms. Paulsen and Mr. Robinson." (Ruling on Supplemental Motion for New Trial).

Petitioner's recital of the procedural history of the case is adopted as essentially correct. (Pet. pp. 5-7).

REASONS FOR DENYING THE WRIT

I. THE INEFFECTIVE ASSISTANCE OF COUNSEL HOLDING OF THE FEDERAL COURT OF APPEALS IS CONSISTENT WITH THE HOLDINGS OF THE MAJORITY OF COURTS WHO HAVE ADDRESSED THE ISSUE.

Petitioner attacks the holding of the Court of Appeals below primarily on the ground that trial counsel's threat to withdraw from representation of respondent, disclose the alleged perjury to the trial judge and testify against him[3] was a perfectly constitutional and ethical response to his client's apparent desire to testify untruthfully. The paucity and quality

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[3]Petitioner's attempt to characterize attorney Robinson's threat as one limited to impeachment by cross examination is simply not borne out in the context of the record. (Pet. p. 10). Further, Petitioner has never controverted the fact that this was a threat to testify in any prior proceedings. None of the dissenters in the Court of Appeals questioned this fact. (A26, 31). In any event, impeaching a client by disclosing confidential material on cross-examination is as egregious a violation of the right to counsel as testifying.

Further, the record clearly shows that the threat to testify was part and parcel of the series of threats which caused Petitioner to change his testimony. (A89).

Finally, whether Petitioner characterized his disagreement with trial counsel as a "conflict" is irrelevant. (Pet. p. 10). Sophisticated trial counsel is in a much better position to recognize a conflict of interest than a client. Cuyler v. Sullivan, 446 U.S. 335, 346-7, 100 S.Ct. 1708, 1717, (64 L.Ed.2d 333) 45-6 (1980).

of Petitioner's authority underscores the weakness of his position.

Petitioner's principal authority for the contention that the majority of jurisdictions would support trial counsel's actions is the ABA/BNA Lawyers' Manual on Professional Conduct, a document which is nothing more than a treatise, never formally adopted by the ABA. Reliance on this treatise is especially questionable when the ABA Model Rules of Professional Conduct and its commentary, adopted by the ABA, note that, even if counsel might believe that ethical standards require disclosure of the suspected perjury, the ethical standards are "subordinate" to the defendant's right to counsel. See ABA Model Standard Rule 3.3 and commentary at §§01:146-148. This is consistent with this Court's statement in Jones v. Barnes, ___U.S.___, 103 S.Ct. 3308, 3314, 77 L.Ed.2d 987, 995, N. 7(b), (1983), that, "..., the fact that the ABA may have chosen to recognize a given practice as desirable or appropriate does not mean that that practice is required by the Constitution."

Further, the treatise's contention that the majority of jurisdictions approve disclosure of the planned client perjury is simply wrong as applied to criminal cases. In almost all cases where the issue of client perjury has arisen, the courts have stated that, whatever remedy is taken, the right to counsel is violated when contents of confidential attorney-client

conversations are disclosed. Whiteside v. Scurr, 744 F.2d 1323, 1329 (8 Cir. 1984); Butler v. United States, 414 A.2d 844, 852, 854 (D.C. Cir. 1980); Lowery v. Cardwell, 575 F.2d 727, 730 (9 Cir. 1978); United States ex. rel. Wilcox v. Johnson, 555 F.2d 1115, 1122 (3 Cir. 1977)

Thus, the great weight of authority supports the Court of Appeals' conclusion that trial counsel's actions violated respondent's right to the effective assistance of counsel.

Next, Petitioner claims that the Court of Appeals erred in applying the limited presumption of prejudice for conflict of interest cases to the situation here. However, as the Court of Appeals stated, trial counsel was no longer just representing Whiteside's interests when it became clear what Whiteside was going to testify to. Counsel was also representing his own interests in protecting himself from claims of ethical violations or suborning perjury. Moreover, being a witness against one's client is the height of conflict of interest. Whiteside, 744 F.2d at 1329. See Lowery v. Cardwell, 575 F.2d 727, 732 (9 Cir. 1978), (concurring opinion); Commonwealth v. Wolfe, 447 A.2d 305, 310-11 (Pa. Sup. 1982). Trial counsel was shown to be "actively representing conflicting interests," which "adversely affected his...performance." Strickland v. Washington, ___U.S.___, 104 S.Ct. 2052, 2067, 80 L.Ed.2d 674, 696 (1984), (citing Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708,

64 L.Ed.2d 333 (1980). The limited presumption of prejudice was correctly applied.

II. RESPONDENT'S RIGHT TO TESTIFY WAS VIOLATED BY TRIAL COUNSEL'S CONDITIONING FURTHER REPRESENTATION AND CONFIDENTIALITY ON THE CONTENT OF THAT TESTIMONY.

Petitioner attacks the Court of Appeals' "alternate" holdings by challenging the premise that a criminal defendant has a constitutional right to testify. (Pet. p. 14). However, as the Court of Appeals' decision states, the right to testify is recognized in the majority of courts of appeals that have faced the question. Whiteside, 744 F.2d at 1329-30; United States v. Bifield, 702 F.2d. 342, 349 (2 Cir.), cert. den., 103 S.Ct. 2095 (1983); Alicea v. Gagnon, 675 F.2d. 913, 923 (7 Cir. 1982); Wilcox, 555 F.2d at 118-19. Even the dissenters below did not challenge this basic premise. See dissent of Fagg, J., (A32 of Pet.). Moreover, this Court appeared to recognize a constitutional right to testify in Harris v. New York, 401 U.S. 222, 225, 91 S.Ct. 643, 645, 28 L.Ed.2d 1, 4 (1971) and by its statement in Jones v. Barnes, ___U.S.___, 103 S.Ct. 3308, 3312, 77 L.Ed.2d. 987, 993 (1983), where the decision to testify was recognized as one to be made personally by the defendant. Clearly, the existence of a right to testify on one's own behalf is no longer subject to serious dispute.

Next, Petitioner avers, in essence, that the right to

testify does not protect a criminal defendant from all consequences which may flow from his or her testimony. (Pet. pp. 15-16). The Court of Appeals' opinion does not dispute this. Clearly, a defendant may be punished with a perjury charge or enhanced punishment if he or she lies while testifying. United States v. Grayson, 438 U.S. 41, 53-4, 98 S.Ct. 2610, 2617, 57 L.Ed.2d 582, 592 (1978). Further, a testifying defendant may be impeached by prior inconsistent statements made to police. Harris, 401 U.S. at 225-6, 91 S.Ct. at 645-6, 28 L.E.2d at 4-5. However, nothing in these cases suggests that a client determined to commit perjury waives his or her right to the assistance of counsel. Whiteside, 744 F.2d at 1328; Order denying motion for rehearing en banc. (A22 and A25 of Pet.)

Finally, Petitioner claims that the Court of Appeals' decision disarms counsel from dissuading a defendant from the consequences of his or her decision to testify. (Pet. pp. 15-16). This confuses the distinction between those decisions counsel makes as a matter of strategy and those which are up to the client to make. Counsel may not condition continued representation on the defendant's choice in these matters. See Dounton v. Perini, 511 F.Supp. 258, 267-8 (N.D. Ohio 1981). The unconstitutional coercion resulting from trial

counsel's threat was especially effective here because Petitioner had been earlier warned that his "chances of getting another change of attorneys are about zero(?)." (A53)

Thus, it is clear that Petitioner was put to an unconscionable choice between his right to testify and the right to assistance of counsel. The Court of Appeals' "alternate" holding supports denial of the writ.

III. THE LIMITED HOLDING OF THE COURT OF APPEALS MAKES IT UNNECESSARY TO FURTHER EXPLORE THE QUESTIONS RAISED BY PETITIONER.

Petitioner urges this court to grant the writ of certiorari by stating that the Court of Appeals' decision leaves unanswered the question of what a criminal defense attorney must do when confronted with a client who insists on committing perjury. However admirable Petitioner's desires are in this regard, the questions he wants answered are beyond the scope of this case.

The Court of Appeals' opinion makes clear that its holding is limited to the facts of the issue presented. That is, trial counsel deprived Respondent of his right to counsel and due process when he threatened to disclose his client's perjury and testify against him. Whatever might be argued as to what counsel must do when faced with this situation, it is clear that counsel cannot become or threaten to become the client's adversary. Whiteside, 744 F.2d at 1329; concurrence of

Lay, C.J., in Order denying rehearing en banc. (A24-A26). Further, no reading of the ethical rules of conduct, as applied to criminal cases, required that trial counsel take the steps he did.

Thus, this case does not present the type of situation where an authoritative pronouncement by this Court on the issue at hand is necessary or desirable. Any expostulation of what an attorney may or must do when confronted with client perjury would be merely "advisory" as to this case.[4] See Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 959, 22 L.Ed.2d 113, 117 (1969).

CONCLUSION

For all of the above reasons, it is respectfully submitted that the petition for a writ of certiorari in the above-captioned matter should be denied.

Respectfully submitted,

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[4] A case such as United States v. Curtis, 742 F.2d 1070, 1076 (7 Cir. 1984), where counsel completely prevented a perjury determined defendant from testifying presents a more appropriate fact situation for resolving those questions.

CERTIFICATE OF SERVICE

I, Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby certify that on March 15, 1985, I caused a copy of Respondent's Resistance to Petition for a Writ of Certiorari in the case of Nix v. Whiteside, No. 84-1321, to be sent by first class mail, postage prepaid to: Mr. Brent R. Appel, Deputy Attorney General of Iowa, Hoover State Office Building, Second Floor, Des Moines, Iowa 50319.

Patrick R. Grady

AFFIDAVIT OF SERVICE

STATE OF IOWA)
) ss:
COUNTY OF LINN)

I, Patrick R. Grady, a member in good standing of the bar of the Supreme Court of the United States, do hereby depose that on March 15, 1985, I caused an original and three copies of Respondent's Resistance to Petition for a Writ of Certiorari in the case of Nix v. Whiteside, No. 84-1321 to be sent by first class mail, postage prepaid to: Clerk United States Supreme Court, Washington, D.C. 20543.

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214 First St. S.W.
Cedar Rapids, Iowa 52404
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Subscribed and sworn to before me by the said Patrick R. Grady on this 15 day of March, 1985.

Notary Public, State of Iowa